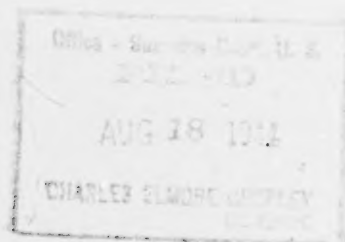


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No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1944

LENA ROSENMAN AND THE NATIONAL CITY BANK OF
NEW YORK, A CORPORATION, AS EXECUTORS OF THE
LAST WILL AND TESTAMENT OF LOUIS ROSENMAN,
DECEASED, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION



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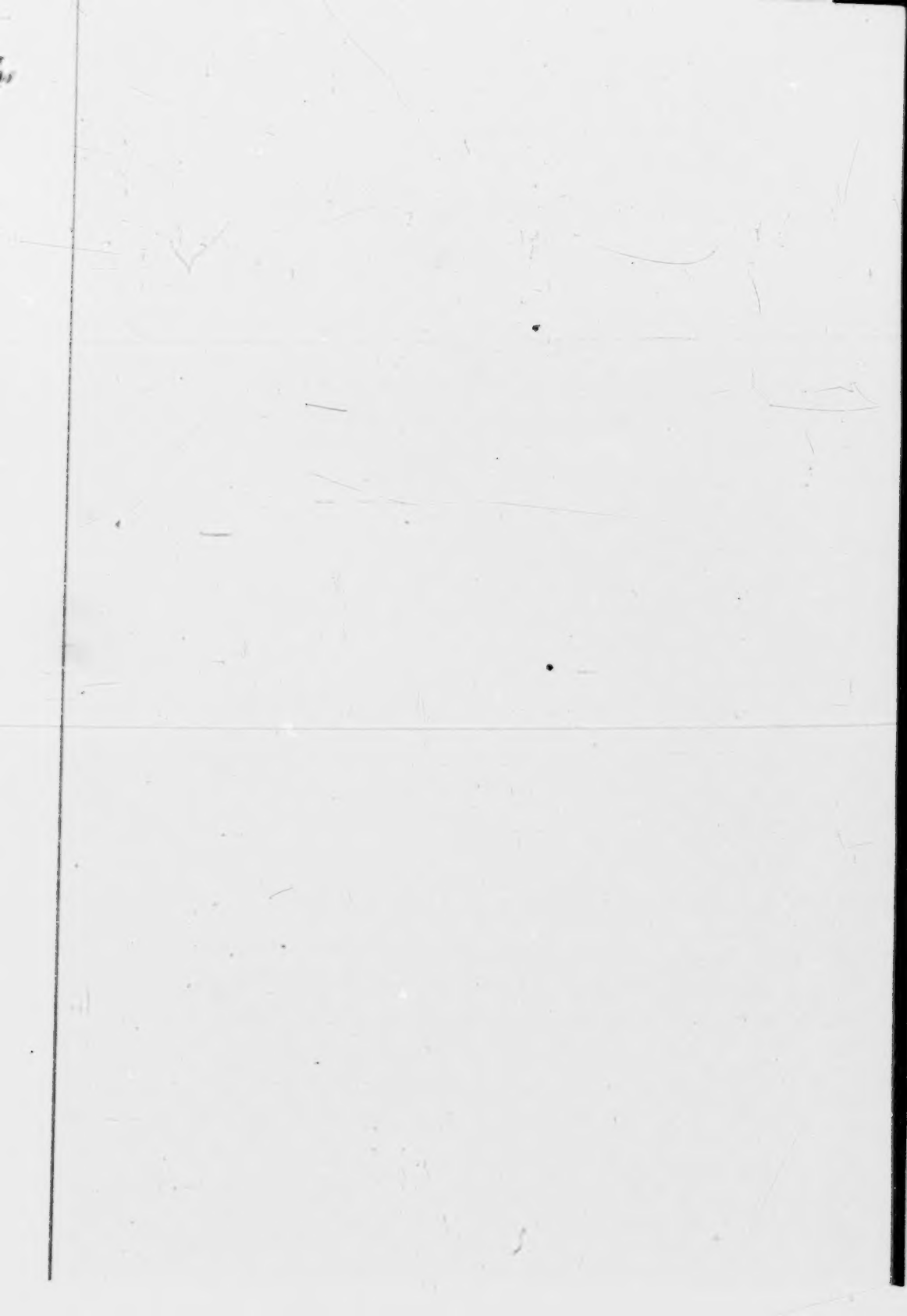
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OPINION BELOW

The opinion of the Court of Claims (R. 13-18)
is reported in 53 F. Supp. 722.

JURISDICTION

The judgment of the Court of Claims was
entered April 13, 1944. (R. 18-19.) The petition
for a writ of certiorari was filed June 29, 1944.
(R. 19.) The jurisdiction of this Court is in-
voked under Section 3 (b) of the Act of February
13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The executors of an estate having received an extension of time within which to file the estate tax return made a payment of estimated tax due which was deposited as an internal revenue collection by the Collector in a so-called suspense account to the credit of the Treasurer of the United States. Later when the tax was determined and assessed this amount was applied against the assessment. The question involved is whether a claim for refund filed more than three years from the date of the actual payment, but within three years from the time the Collector applied the amount against the assessment, is timely, under Section 319 (b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 304 (a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (2) the de-

ductions allowed under section 303; (3) the value of the net estate of the decedent as defined in section 303; and (4) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

* * * * *

SEC. 305. (a) The tax imposed by this title shall be due and payable one year after the decedent's death, and shall be paid by the executor to the collector.

(b) Where the Commissioner finds that the payment on the due date of any part of the amount determined by the executor as the tax would impose undue hardship upon the estate, the Commissioner may extend the time for payment of any such part not to exceed five years from the due date. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(c) If the time for the payment is thus extended there shall be collected, as a part of such amount, interest thereon at the rate of 6 per centum per annum from the expiration of six months after the due date of the tax to the expiration of the period of the extension.

* * * * *

SEC. 306. As soon as practicable after the return is filed the Commissioner shall

examine it and shall determine the correct amount of the tax.

SEC. 319 [as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 810]. * * *

(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

* * * * *

Treasury Regulations 80 (1934th ed.):

ART. 69. *Extension of time by Commissioner.*—If it is impossible for the executor to file a reasonably complete return within one year from the date of death, the Commissioner may, upon application from the executor showing good and sufficient cause, grant an extension of time not to exceed six months from the due date. Before the expiration of the extension period granted a return as complete as possible must be filed. The return thus filed will be the return required by section 304 (a) and any tax shown thereon will be the "amount determined by the executor as the tax" referred to in section 305 (b) and section 307. Such return cannot thereafter be amended although supplemental informa-

tion may subsequently be filed that may result in a finally determined tax different from the amount shown as the tax by the executor upon his return. An extension of time for filing the return does not operate to extend the time for the payment of the tax, which is due one year after the decedent's death. An extension of time in which to make payment of the tax may be secured as provided in article 82.

STATEMENT

The special findings of fact of the Court of Claims (R. 6-13), in so far as material to the issue involved in the petition, may be summarized as follows:

Petitioners, as executors under the will of Louis Rosenman, who died December 25, 1933, requested an extension of time on December 11, 1934, within which to file the estate tax return, which request was granted by the Commissioner of Internal Revenue on December 15, 1934 (R. 6). In the letter granting the extension, the Commissioner advised petitioners that the extension of time within which to file the return did not operate to extend the time for payment, and further stated (R. 7):

It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

On December 24, 1934, petitioners delivered to the Collector a check for \$120,000 accompanied by a letter of transmittal in which it was stated, *inter alia*: "We are delivering to you herewith, by messenger, an Estate check payable to your order, for \$120,000, as a payment on account of the Federal Estate tax" (R. 7).

At the time the Collector received the above-mentioned sum of \$120,000, no assessment of estate tax was outstanding against the estate of Louis Rosenman, and on December 26, 1934, the Collector placed the sum of \$120,000 to the credit of that estate in Account 9. Account 9 is a suspense account in the books of the Collector of Internal Revenue for the First District of New York to which monies received in connection with federal estate taxes, and other miscellaneous taxes, are deposited if no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7-8.)

Later the petitioners filed an estate tax return showing a tax due of \$80,224.24, which was assessed in March 1935. On March 22, 1935, the amount of \$120,000 was classified, and \$80,224.24 thereof was credited against the assessment. The

balance of such amount of \$120,000, i. e., \$39,775.76, remained in Account 9 to the credit of the estate until April 1938. (R. 8.) On March 28, 1935, the Collector notified the petitioners of the application of \$80,224.24 to the assessment in that amount (R. 8). On March 26, 1938, petitioners filed a claim for the refund of \$39,775.76 on the ground that according to the notice and demand forwarded by the Collector on March 28, 1935, such amount was due and owing to them (R. 8).

Upon a subsequent audit of the estate tax return, the Commissioner determined that the total tax due after allowance for state estate and inheritance tax payment was \$128,759.08, resulting in a deficiency of \$48,534.84. Petitioners were duly notified of this deficiency and it was assessed in April 1938. (R. 8-9.) In April 1938, the Collector applied the balance of \$39,775.76 to the credit of petitioners in Account 9 in partial satisfaction of the deficiency, and payment of the balance of the assessment, i. e., \$8,759.08, together with interest thereon of \$1,738.26, was demanded. On April 22, 1938, petitioners paid to the Collector the total amount so demanded of \$10,497.34. (R. 9.)

On May 20, 1940, petitioners filed with the Collector a claim for refund of \$24,717.12 upon the ground that the estate was entitled to additional deductions for executors' commissions, attorneys' fees, miscellaneous administration expenses, and

for \$25,000 paid to Martin Rosenman in settlement of a claim against the estate of the decedent. The Commissioner duly rejected the claims for refund filed on March 26, 1938, and May 20, 1940. * (R. 9.) This suit was instituted in the Court of Claims within two years from such rejection (R. 1).

The court below held upon the foregoing facts that the petitioners were entitled to certain deductions claimed (R. 18), but that any resulting refund in excess of the amount of \$10,497.34, the amount paid on April 22, 1938, was barred by the statute of limitations (R. 16). Judgment was accordingly rendered for \$10,497.34 with interest (R. 18, 19).

ARGUMENT

1. The decision below is correct. Section 319 (b) of the Revenue Act of 1926, as amended, *supra*, required that all claims for the refunding of estate tax shall be filed "within three years next after the payment of such tax." This requirement of the statute must be strictly complied with in a suit brought against the United States. Cf. *Rock Island &c. R. R. v. United States*, 254 U. S. 141, and *United States v. Felt & Tarrant Co.*, 283 U. S. 269. On December 24, 1937, three years after the delivery to the collector of petitioners' check for \$120,000, no claim for refund had been filed.

That the delivery of the check constituted payment for purposes of the statute of limitations

is clear. Petitioners sought an extension of time only for the filing of the estate tax return. Permission for this late filing was granted, but the Commissioner expressly advised that this did not operate to extend the time for the payment of the tax, which under the provisions of Section 305 (a) of the Revenue Act of 1926, *supra*, was due one year after the decedent's death. Petitioners accordingly sent a check for the estimated tax, stating that it was "a payment on account of the Federal Estate tax" (R. 7). This amount was paid at a time when the tax was due and owing to the Government, though the amount thereof had not been determined because of the failure to file an estate tax return. This amount was credited to so-called Account 9; payments thus placed are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7-8.) When, later, part of this amount was applied to a deficiency assessed by the Collector, interest was not charged against the estate on that portion of the deficiency. (R. 9.) From every point of view, therefore, payment which started the running of the statute of limitations was made at the time the check was delivered, and not, as petitioners contend, when part of the proceeds of the check was transferred by the bookkeeping entry from

Account 9 and applied in partial satisfaction of the tax deficiency.

There is no conflict of decisions. No other case has dealt with the problem of the running of the statute of limitations when payment is made on account of tax liability in advance of the filing of the return. The petition alleges a conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Busser v. United States*, 130 F. (2d) 537. That case involved the question whether the taxpayer was entitled to interest under Section 614 of the Revenue Act of 1928, c. 852, 45 Stat. 791, which allows interest "upon any overpayment in respect of any internal-revenue tax, * * *." The court held that the taxpayer was not entitled to interest on an amount paid in advance of the due date, which was later determined to be an overpayment and refunded. The same result was reached in *Moses v. United States*, 28 F. Supp. 817 (S. D. N. Y.), and a contrary result was reached in *Atlantic Oil Producing Company v. United States*, 35 F. Supp. 766 (C. Cls.).¹ Whether interest is allowable as on an overpayment, in the event of such a refund, is a question distinct from that in the present case. While there is statutory provision

¹ At the time of the *Atlantic Oil* decision there was no conflict, and the Government did not petition for certiorari. In the subsequent *Busser* case, decided in the Government's favor, the taxpayer did not petition.

for interest on "overpayments," that provision must be interpreted in the light of the concept of interest and the reasons for its allowance. As was pointed out in both the *Busser* and *Atlantic Oil* cases, *supra*, when an excessive payment is made in advance of the tax return, the Collector is not guilty of a mistake in retaining the amount, since he has no means of determining the true liability. The payment is made for the convenience of the taxpayer, who should not be permitted to earn interest on so much of the payment as is found to be excessive.² We do not believe that review of the present decision would serve to resolve the question whether interest is allowable in the event of partial refund of an amount paid in advance of the tax return.

The decision below does not lead to any confusion nor does it, as petitioners contend, "tend to discourage taxpayers from making such deposits." (Pet., p. 10.) Taxpayers will doubtless continue to make such deposits in order to avoid payment of interest and penalties on taxes due.

² In the *Busser* case, moreover, the circuit court of appeals appeared to regard the payment as not then being due. The court said (p. 539):

"* * * At the time the check was sent here, there was nothing due. Time for tax settlement had been extended; the remittance, while an entirely proper thing to make, and a safeguard against interest charges against the taxpayer, was entirely voluntary."

In the present case, the Collector made it clear that the time for payment was not extended.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions on the precise question involved. The petition should be denied.

Respectfully submitted.

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AUGUST 1944.

